

124 FERC ¶ 61,133
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

KeySpan-Ravenswood, LLC
TransCanada Facility USA, Inc.

Docket No. EL08-57-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER
DISCLAIMING JURISDICTION

(Issued August 1, 2008)

1. In this order, we find that a certain passive participant is not, because of a lease financing transaction, subject to the Commission's jurisdiction under section 201(e) of the Federal Power Act (FPA).¹ We also find that this participant is not an "electric utility company" as defined by section 1262(5) of the Public Utility Holding Company Act of 2005 (PUHCA).²

Background

2. KeySpan-Ravenswood, LLC (Ravenswood) and TransCanada Facility USA, Inc. (TransCanada USA) (collectively, Applicants) filed an application under section 203 of the FPA³ requesting authorization for the disposition of jurisdictional facilities associated with the restructuring of an existing lease arrangement and the indirect disposition of control over Ravenswood's jurisdictional facilities. The Commission granted this authorization.⁴

3. The Applicants also requested, on behalf of a joint KeySpan Corporation (KeySpan) and National Grid USA entity, i.e., the Sublessor, that the Commission

¹ 16 U.S.C. § 824(e) (2006).

² 42 U.S.C. § 16451(5) (2006).

³ 16 U.S.C. § 824d (2006).

⁴ See *KeySpan-Ravenswood, LLC and TransCanada Facility USA, Inc.*, 123 FERC ¶ 62,235 (2008).

find that the Sublessor will not be a “public utility” under section 201 of the FPA or an “electric utility company” under section 1262(5) of PUHCA.

4. As described in greater detail below, the Sublessor will, according to the Applicants, be a newly created, limited liability company created to participate as a passive participant in the Ravenswood Expansion Lease and Sublease arrangements. The Sublessor will be a wholly-owned indirect subsidiary of National Grid plc. (National Grid). National Grid USA and KeySpan, both subsidiaries of National Grid, will divide ownership of the newly created Sublessor. National Grid USA will directly own 95 percent of the ownership interests in the Sublessor and KeySpan will own the remaining five percent.

5. As a condition to approving National Grid’s acquisition of KeySpan, the New York Public Service Commission required National Grid and KeySpan to sell their ownership interests in the Ravenswood Generating Station. National Grid and KeySpan have agreed to sell all of their ownership interests to TransCanada USA.

6. Currently, Ravenswood controls the entire Ravenswood Generating Station through ownership and lease arrangements. The Ravenswood Generating Station is comprised of electric generation facilities that Ravenswood acquired from Consolidated Edison of New York, Inc. (Ravenswood Facility) and a smaller electric generating unit, and related facilities that were subsequently constructed at the site (Ravenswood Expansion).

7. Further, Ravenswood leases the Ravenswood Expansion portion of the Ravenswood Generating Station from SE Ravenswood Trust, a passive owner/lessor,⁵ and Ravenswood leases the land upon which the Ravenswood Expansion is located (Ravenswood Expansion Site) to SE Ravenswood Trust, who then subleases the land back to Ravenswood, pursuant to a net lease financing arrangement (Ravenswood Expansion Lease).

8. Under the new Lease Restructuring Transaction, Ravenswood will assign all of its rights, title, and interests as lessee in the existing Ravenswood Expansion Lease, and as lessee in the Ravenswood Expansion Site, to the Sublessor. The Sublessor will then replace Ravenswood as the lessee under the Ravenswood

⁵ See *KeySpan-Ravenswood, LLC*, 107 FERC ¶ 61,100, at P 9-10 (2004) (Commission found SE Ravenswood Trust is not a “public utility” under section 201(e) of the FPA).

Expansion Lease, and SE Ravenswood Trust will continue to be the owner/lessor of the Ravenswood Expansion under the Ravenswood Expansion Lease. The Sublessor will immediately sublease the Ravenswood Expansion, and the Ravenswood Expansion Site, back to Ravenswood.

9. Under the sublease arrangements, Ravenswood will continue to control the Ravenswood Expansion. The new Lease Restructuring Transaction will not modify the Ravenswood Expansion Lease with SE Ravenswood Trust (i.e., SE Ravenswood Trust will continue to be the passive owner/lessor of the Ravenswood Expansion). While the Sublessor will become the direct lessee under the Ravenswood Expansion Lease and the lessor of the Ravenswood Expansion Site, Ravenswood will continue to control the Ravenswood Expansion and such land as the sublessee. The Sublessor's only role will be as an intermediate passive lessee/sublessor between SE Ravenswood Trust and Ravenswood. The consummation of the new Lease Restructuring Transaction will not result in the Sublessor, KeySpan, National Grid, or any of their affiliates having any ownership interest in, or control over, the Ravenswood Expansion or control over Ravenswood's power sales therefrom.

10. Notice of filing was published in the *Federal Register*, with protests or interventions due on or before May 21, 2008.⁶ None was received.

Discussion

A. Whether Sublessor Will Be A Public Utility

11. The Applicants seek a disclaimer of jurisdiction over the passive participant (the Sublessor), i.e., a determination that it will not be regarded as a "public utility" as defined in section 201 of the FPA.

12. Section 201(b)(1)⁷ of the FPA states that:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce. . . . The Commission shall have jurisdiction over all facilities used for such transmission or sale of electric energy. . . .

⁶ 73 Fed. Reg. 26,098 (2008).

⁷ 16 U.S.C. § 824(b)(1) (2006).

13. Section 201(e) of the FPA states that “[t]he term ‘public utility’ . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission. . . .”

14. The Commission has addressed the application of section 201 to entities with passive interests in jurisdictional facilities on numerous occasions.⁸ The Commission uses a two-step analysis for determining whether a financial interest⁹ in jurisdictional facilities makes the entity a “public utility” under the FPA. Under this precedent, the Commission first determines whether the passive participant will operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of selling or transmitting electric energy. It would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities, and subject them to the Commission’s jurisdiction, where these participants hold only equitable or legal title to the facilities, and are removed from the operation of the facilities and the sale or transmission of electric energy.

15. Here, the Applicants state, the Sublessor will not: (1) have any ownership interests in, or have any operational control over, the Ravenswood Generating Station, Ravenswood, or any other electric facilities (or companies owning such facilities) for the generation, transmission, or distribution of electric energy at wholesale or retail; or (2) buy, sell, or transmit energy, capacity, or ancillary services at wholesale or retail.

16. In light of the facts presented in the petition and consistent with Commission precedent, we find that the Sublessor, as contemplated in the proposed lease transaction, will be a passive participant that does not exercise control or decision-making authority over the proposed leased facilities, and is not otherwise in the business of selling or transmitting electric energy. Accordingly,

⁸ See, e.g., *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996); *FirstEnergy Generation Corp.*, 119 FERC ¶ 61,171 (2007).

⁹ Here, the Sublessor’s financial interest through the lease/sublease differs from precedent, since there is no direct ownership interest, i.e. holding of equitable or legal title. The precedent applies, however, because the fact that the Sublessor will have no ownership interest at all simply removes one of the two bases on which an entity can be found to be a public utility.

we will disclaim jurisdiction over the passive participant, as requested by the Applicants.¹⁰

B. Whether The Sublessor Will Be An Electric Utility Company

17. In addition, the Applicants request a determination that the Sublessor will not be an “electric utility company” under section 1262(5) of PUHCA.¹¹

18. “Electric utility company” is defined in section 1262(5) of PUHCA and the Commission’s regulations as “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.”¹²

19. Here, the Applicants state that the Sublessor will not have any ownership interest in, or have any operational control over, the Ravenswood Generating Station, Ravenswood, or any other electric facilities (or companies owning such facilities) for the generation, transmission, or distribution of electric energy for sale at wholesale or retail.

20. In light of the facts presented, we find that the Sublessor, as contemplated in the proposed lease transaction, will not be an “electric utility company,” as it does not have any ownership interests in, or operational control over, the proposed leased facilities. Accordingly, we find that the Sublessor is not an “electric utility company” under 1262(5) of PUHCA.¹³

The Commission orders:

(A) The Applicants’ request that the Commission disclaim FPA jurisdiction over the Sublessor in this proceeding, based on the facts presented by the Applicants in the petition, is hereby granted.

¹⁰ If the facts change so that the Sublessor operates the Ravenswood Generation Station in order to make sales of electric energy at wholesale or to engage in transmission of electric energy in interstate commerce, it will become a public utility and will be required to make filings under section 205 of the FPA. *See, e.g., Unicom Investments, Inc.*, 91 FERC ¶ 61,109, at 61,387, n.9 (2000).

¹¹ 42 U.S.C. § 16451(5) (2006); 18 C.F.R. § 366.1 (2008).

¹² *Id.*

¹³ If the facts change so that the Sublessor gains an ownership interest or operates the facilities, it will become an “electric utility company” under PUHCA.

(B) The Applicants' request that the Commission find that the Sublessor is not an "electric utility company" under section 1262(5) of PUHCA is hereby granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.